No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 3

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation), *Appellant,* vs. W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association), *Appellee.*	

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLEE'S BRIEF.

N. J. BARRY,
Reno, Nevada,
Attorney for Appellee.

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PAUL P. O'BRIEN,
CLERK

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Subject Index

	Page
Statement of Facts	1
Argument	2
Summary	26

Table of Authorities Cited

Cases

Cases	Pages
Beaver Co. v. Home Indemnity Co., 52 Pac. (2d) 435	18
Beemer v. Packard, 28 N. Y. Supp. 1045	25
Broadway-Main Street Bridge Dist. v. Taylor, 57 S. W. (2d) 1041	19
Farsch, In re, 31 Pac. 755	18
First Wisconsin National Bank of Milwaukee v. Kingston, 94 A. L. R. 465	18
First National Bank of Seattle v. Mansfield, 221 Pac. 595	16
Gamble v. Wimberly, 44 Fed. (2d) 329	3
Greva v. Rainey, Wood, et al., 33 Pac. (2d) 697	18
Knight v. Whitman, 99 Am. Dec. 652	24
Ledford v. Skinner, 69 Pac. (2d) 519	18
Louisville v. Fidelity & Columbia Transfer Co., 54 S. W. (2d) 40	19
Merrill v. National Bank of Jacksonville, 173 U. S. 131, 43 L. Ed. 640	20
Organ v. Winnemucca State Bank & Trust Co., 26 Pac. (2d) 237	21
Sexton v. Dreyfus, 219 U. S. 345, 55 L. Ed. 244	4
State v. State Bank of Alamagordo, 32 Pac. (2d) 1017	19
State ex rel. Hansen, Sup'r of Banking v. Chelan County et al., 54 P. (2d) 1006	11
Ticonic Nat. Bank v. Sprague, 303 U. S. 406	4, 17, 21, 26
U. S. v. Knox, 111 U. S. 784, 28 L. Ed. 603	17
U. S. Fidelity & Guaranty Co. v. Malia, Bank Commissioner, 49 Pac. (2d) 954	20
Victor, In re, 166 N. Y. S. 1012	19

Statutes

Nevada Compiled Laws of 1929, Section 702 24

Texts

22 Cyc., p. 73 22

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Lyon County Bank Mortgage Corporation (a corporation),

Appellant,

vs.

W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),

Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLEE'S BRIEF.

STATEMENT OF FACTS.

On the 1st day of July, 1931, the Lyon County Bank executed to The Reno National Bank its note for $60,500 payable on demand with interest at the rate of 8% per annum, and pledged to The Reno National Bank, as security for the payment of the said note, certain securities mentioned and set forth in the complaint.

When the appellee, on the 9th day of December, 1932, was appointed Receiver of The Reno National Bank, the aforementioned note was an asset of The

Reno National Bank. The Lyon County Bank had gone into insolvency on the 16th day of February, 1932. The question involved in this suit is whether or not interest can be paid on the note which the appellee holds after the date of insolvency of the Lyon County Bank.

This is the only question of law involved in the case, and is so conceded by appellant on page 14 of its brief, as follows:

> "The question of law is whether under the Nevada statute interest on a claim against an insolvent bank, computed over any period after insolvency can be charged or collected, and whether the rule requiring a ratable distribution to creditors permits any claim to be increased by interest after insolvency, or permits a secured creditor to retain any interest collected from collaterals, other than the interest accrued and collected from collaterals after insolvency, applying all other collections from the collaterals to the reduction of the claim for principal alone, without interest."

ARGUMENT.

If the above is the only question of law involved, then it would seem to be unnecessary to go into any discussion of the federal authorities on the same question. However, I think it would be of benefit to the Court to discuss the federal authorities.

It may be admitted that formerly there was quite some diversity of decisions on this very question. However, this much is clear, that the appellee in this case

had the right to apply the avails, interest or dividends collected on the pledged securities to the payment of interest and principal until both had been paid in full.

That is the rule laid down in the case of

Gamble v. Wimberly, 44 Fed. (2d) 329,

as follows:

> "There is one further point which remains to be disposed of, because possibly presented by the record in the present case, although the record is not clear on this point. We refer to the question whether, assuming that interest and dividends accrued upon some of the collateral since the date of the debtor bank's insolvency, such interest and dividends are to be excepted from the rule here laid down, and may be retained by the trustee. Such an exception was made in the Sexton Case, the Court relying upon the English rule (page 346 of 219 U. S., 31 S. Ct. 256), and we believe that a similar exception is proper in the present case, because, if granted a creditor under his more restricted rights under the Bankruptcy Act, a fortiori he would seem to be entitled to as much in the present situation."

Under the authority immediately cited, we need not depend on the avails or interest or dividends collected on the pledged securities for the payment of the interest and principal until both have been paid in full, but we may apply any payments of whatsoever kind or character to the payment of principal and interest.

In support of this contention, I cite the following:

> "Interest and dividends accrued upon some of the securities after the date of the petition. The English cases allow these to be applied to the

after-accruing interest upon the debt. Ex parte Ramsbottom; Ex parte Penfold; and Quartermaine's Case,—supra. There is no more reason for allowing the bankrupt estate to profit by the delay beyond the date of settlement than there is for letting the creditors do so. Therefore, to apply these subsequent dividends, etc., to subsequent interest, seems just."

Sexton v. Dreyfus, 219 U. S. 345, 55 L. Ed. 244.

This very question has been fairly and squarely decided by the Supreme Court of the United States in the case of

Ticonic Nat. Bank v. Sprague, 303 U. S. 406,

decided on March 7, 1938. It is said in the opinion:

"The question for decision is whether or not a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency.

"On March 28, 1931, respondent Lottie F. Sprague delivered $5,022.18 to the trust department of the Ticonic National Bank of Waterville, Maine, in trust, under an agreement which authorized the trustee to invest in bonds or securities and to deposit at least $1,000 in its savings department at usual rates of interest; required specified monthly payments, subject to certain conditions, to Margaret Sprague, also a respondent here; and reserved to the grantor the right to revoke the trust and resume possession of the trust funds.

"The Ticonic Bank had been authorized by the Federal Reserve Board to act in a trust capacity, as provided in Section 11 (k) of the Federal Reserve Act, as amended (12 U.S.C., Sec. 248 (k)). That Act provides that funds held in trust awaiting investment 'shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities' approved by the Board of Governors of the Federal Reserve System, and further provides that 'In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.'

"Pending investment of funds under the Sprague trust and pursuant to its resolution implementing the statutory provision just quoted, the Ticonic Bank placed the funds of this trust, along with other trust funds awaiting investment or distribution, as a deposit in its commercial checking department to the credit of its trust department, and secured the total amount of such funds by setting aside in the trust department bonds, including $20,000 Kingdom of Denmark 6's, 1942, at least equal in value to the total amount of such deposits.

"On July 29, 1935, respondents, the settlor and beneficiary, brought this suit in the District Court for Maine to have the bonds held as security with respect to the trust. It appears that on August 3, 1931, Ticonic Bank sold its assets (including the Denmark bonds) to the Peoples National Bank (later called Peoples-Ticonic National Bank) in consideration of its agreement to 'assume or pay all the indebtedness of said Ticonic Bank to its

depositors'; that Ticonic Bank then went into voluntary liquidation; that on March 4, 1933, the Peoples-Ticonic Bank was closed; that Arthur Picher was appointed receiver for Peoples-Ticonic Bank on November 6, 1933, and subsequently, on June 28, 1934, for the Ticonic Bank, which had been continuing its voluntary liquidation.

"The lower courts treated the suit, brought against both banks and against Picher as receiver, as one to assert and enforce the lien protecting the uninvested funds. They held that, in view of Section 11(k) of the Federal Reserve Act, as amended, respondents had acquired a lien upon the bonds set apart by the Ticonic Bank to secure the deposit of the trust department; and that this lien had never been discharged or divested and so extended to the proceeds of the Denmark bonds, which had been sold by the receiver for $20,722.66. We do not pause to state the conclusions of fact and of law by means of which the lower courts arrived at this result, for in the grant of the writ of certiorari this Court declined to review the ruling that a statutory lien for the protection of the owners of the funds held for investment extended to the proceeds of the Denmark bonds, the lower courts having predicated their decision in large part on the facts of this particular case.

"The decrees below did not end with the matters just stated. The District Court, finding that the proceeds of the bonds exceeded the trust funds on deposit, held the respondents entitled to payment in full of $3,649.65, the amount to which the Sprague trust account had been reduced, with interest from the date of the filing of the bill of complaint. At first the Circuit Court of Appeals reversed that part of the decree allowing interest,

but on rehearing it affirmed the decree in toto, approving the allowance of interest out of the proceeds of the Denmark bonds, which it assumed were sufficient to meet with interest the amount of all trust deposits. It ruled that although the requirement of ratable distribution precludes the recovery of interest against the general funds of an insolvent national bank, the general creditors have no rights in the trust funds here involved until after the secured claims are paid.

"The attention of this Court was called to the fact that the ruling conflicted with decisions in other circuits, where secured creditors were held not entitled to any interest after the suspension of the national bank, and for this reason certiorari was granted, limited to this question of interest.

"As an incident to the right to recover an unexpended balance in a deposit, a depositor is entitled to interest as damages for the failure to pay that balance upon demand. Compare Stewart v. Barnes, 153 U. S. 456, 462; United States v. North Carolina, 136 U. S. 211, 216.

"The bank's obligation to pay interest as damages for the detention of the debt is not cut off by suspension of its business and receivership. The principle has been established, and claimants held entitled to such interest, in cases where the principal amount of each of the claims was paid in full from the assets of the bank (National Bank of the Commonwealth v. Mechanics' National Bank, 94 U.S. 437), including if necessary the double liability of the shareholders. (Richmond v. Irons, 121 U. S. 27, 64.)

"It is true that in the liquidation of national banks, dividends from the general funds on un-

secured claims are made pro rata upon the amount of each claim as of the date of the insolvency, White v. Knox, 111 U. S. 784. This method of distribution gives a proportional part of the available funds to each creditor, in accordance with the statute requiring a 'ratable dividend'. R. S. Sec. 5236. Whether the reason for this method of determining dividends is to avoid prejudice from the inevitable delay of court proceedings for liquidation (In re Humber Ironworks and Shipbuilding Company, IV Ch. App. Cas. 643, 646; American Iron and Steel Manufacturing Co. v. Seaboard Air Line Ry., 233 U. S. 261, 266; cf. People v. American Loan & Trust Company, 172 N. Y. 371, 379); to facilitate administration (Sexton v. Dreyfus, 219 U. S. 339, 344; Chemical National Bank v. Armstrong, 59 Fed. 372, 387); or because on that date the creditors acquire a right in rem against the assets in the hands of the receiver (Chemical National Bank v. Armstrong, supra, 379; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 140; Sexton v. Dreyfus, supra, 345) is immaterial. Dividends are paid on that basis. It is in order to assure equality among creditors as of the date of insolvency that interest accruing thereafter is not considered. But interest is proper where the ideal of equality is served, and so a creditor whose claim has been erroneously disallowed is entitled on its allowance to interest on his dividends from the time a ratable amount was paid other creditors. Armstrong v. American Exchange National Bank, 133 U. S. 433, 470.

"The rule of White v. Knox, supra, does not require that interest be denied to the secured creditors unless the principle of equality of distribution

is to be applied as between all creditors. Secured creditors have two sources of payment for their claims—the liability of the debtor and the liability of the pledged or mortgaged assets. One is personal, the other in rem. The liability in personam of the bank gives rise to a claim in rem against the free assets in the hands of the receiver; the claim in rem against the security continues as a claim in rem against that same security. With respect to the former the secured creditors have merely the same rights as any general creditor, and in so far as dividends are paid to secured creditors from free assets, they share ratably with the unsecured creditors, and their claims bear interest to the same date, that of insolvency. Compare Merrill v. National Bank of Jacksonville, 173 U. S. at 146; Aldrich v. Chemical National Bank, 176 U. S. 618, 638. But to the extent that one debt is secured and another is not there is manifestly an inequality of rights between the secured and unsecured creditors, which cannot be affected by the principle of equality of distribution (American Iron and Steel Manufacturing Co. v. Seaboard Air Line Ry., supra, at 266; Chemical National Bank v. Armstrong, supra, at 376-377), and interest accruing after insolvency may not be withheld on account of that principle.

"The rule as to the date to which interest is to be allowed on secured claims sharing pro rata with unsecured claims, cannot apply to the disposition of pledged or mortgaged assets subject to the lien of individual creditors, unless we are to disregard the rights in these assets acquired prior to insolvency. But 'liens, equities or rights arising * * * prior to insolvency and not in contemplation thereof are not invalidated.' Scott v. Armstrong,

146 U. S. 499, 510; Merrill v. National Bank of Jacksonville, 173 U. S. 131, 145. By contract or, as in this case, by statute, the secured creditors gain or are given a lien on or right in property 'in addition to their claim against the estate of the bank.' Section 11(k) of the Federal Reserve Act as amended. The statutory lien prior to receivership withdrew the pledged security from the assets of the bank available to general creditors, in so far as might be necessary to satisfy the lien. Though title to the collateral was in the name of the bank, it was subject to this lien, and to that extent the property pledged could not properly be said to belong to the bank for purposes of distribution to creditors. Scott v. Armstrong, supra at 510.

"As the obligation to pay interest is not destroyed by the insolvency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion that a secured creditor of a national bank in receivership may enforce his lien against his security, where it is sufficient to cover both principal and interest, until his claim for both is satisfied.

"With respect to analogous liquidations the rule just announced has long been in force. This Court has already held that a lien-holder may look to his lien not only for the principal but also for interest accruing up to the date of payment, though his debtor has gone into bankruptcy (Coder v. Arts, 213 U. S. 223, 245, affirming, 152 Fed. 943, 950) or into equity receivership (American Iron and Steel Mfg. Co. v. Seaboard Air Line Ry. Co., 233 U. S. 261), and though interest will be denied the unsecured creditors if the assets are insufficient to

pay all claims in full. Compare In re Humber Ironworks and Shipbuilding Co., IV Ch. App. Cas. 643, with In re Humber Ironworks and Shipbuilding Co., V Ch. App. Cas. 88. The same rule was applied to state banks in Washington-Alaska Bank v. Dexter Horton National Bank, 263 Fed. 304, 306.

"Petitioners suggest that the rule just laid down may have the effect of penalizing the unsecured creditors for the precaution of the receiver in litigating doubtful claims asserted against segregated assets. This could be true only where the interest accruing to the secured creditors during the pendency of the litigation exceeds the appreciation in value of, and the income from, the security. And since in many cases if the receiver is successful his conduct of the litigation will inure to the advantage of the general creditors, they may fairly be charged with the expenses of contesting the claim, including interest by way of damages. Cf. Chemical National Bank v. Armstrong, supra, 59 Fed. at 384.

"Affirmed."

There is no chance to misunderstand the law under the manifestation of the last decision of the Supreme Court of the United States on this question. We are entitled to payment of principal and interest in full from the proceeds of the collateral, be it principal or interest or dividends.

In addition to the above, the case of

State ex rel. Hansen, Sup'r of Banking v. Chelan County et al., 54 P. (2d) 1006,

from the Supreme Court of the State of Washington is in point. The decision is as follows:

"This action was brought by the state supervisor of banking to require the county treasurer of Chelan County to pay over to him as such supervisor certain funds in her hands which, it was claimed, were assets of the estate of an insolvent bank. To the petition, a demurrer was interposed and sustained. The bank examiner refused to plead further and elected to stand upon his complaint. Judgment was entered dismissing his petition, from which he appeals.

"The facts are these: The Dryden State Bank was a corporation conducting a banking business at Dryden, in Chelan County. On or about January 2, 1931, the treasurer of Chelan County designated this bank as a depositary for public funds required by her to be kept as such treasurer. At the time the bank was designated as a depositary, a contract was entered into by it with the county to pay interest at 2 per cent. per annum on the average daily balances of moneys deposited by the county treasurer. The contract contained the further provision that: 'In event the party of the first part (the bank) becomes insolvent, or the checks or demands of the party of the second part, acting by and through its treasurer, are not met and complied with by the payment of the moneys on deposit, then such funds on deposit shall bear interest from the date of insolvency or default and refusal or neglect to pay, at the rate of six per centum per annum.'

"The bank became insolvent February 2, 1932, and passed into the hands of the state bank examiner. The county treasurer, instead of taking

a surety bond to cover her deposits, took a pledge of securities from the bank, which, by the statute (Rem. Rev. Stat. Sec. 5563), she was permitted to do. After the closing of the bank, the treasurer from time to time collected upon the pledged securities, and on May 1, 1934, all pledged securities had been liquidated and there had been received therefrom by the treasurer $4,687 in all. This was $687 in excess of the principal on deposit when the bank closed. The treasurer contended that out of the $687 there should be withheld for the county $469.09, that being the amount of interest that would have accrued from the time the bank closed, if computed at the rate of 6 per cent. per annum, upon the diminishing balances of the deposit. She offered to pay the state bank examiner the difference between the two sums mentioned, or $226.91, in full settlement. The bank examiner took the position that the contract made January 2, 1931, to pay 6 per cent. interest after insolvency, was one which the bank had no power to make, and that the highest rate of interest the treasurer was entitled to demand was 2 per cent. per annum. The bank examiner claimed that he was entitled to $533.64 out of the $687 remaining after paying the principal on the indebtedness out of the liquidated securities. The treasurer, as already indicated, refused to pay more than $226.91.

"The ultimate question presented upon the appeal is whether the bank had a right to make a contract with the treasurer to pay 6 per cent. upon the deposit after insolvency.

"Rem. Rev. Stat. Sec. 5562, provides that each county treasurer in this state shall annually, on the second Monday in January, designate one or more

banks in the state as depositary or depositaries of public funds held and required to be kept by such treasurer. Section 5563 provides, that, before any designation shall become effectual and entitle the treasurer to make deposits, the bank or banks so designated shall file with the county clerk of such county 'a surety bond to such county treasurer, properly executed by some reliable surety company' qualified under the laws of this state to do business herein, in the maximum amount of the deposits designated by the treasurer to be carried in such bank or banks. This section further provides that the depositary or depositaries may deposit with the county treasurer 'in lieu of the surety bond herein provided for' any of the following enumerated securities, specifying them. Section 5564 provides that, before any designation shall become effectual and entitle the treasurer to make deposits, the bank or banks so designated 'shall also enter into a written contract with the county whose treasurer is to make such deposits, to pay to said county, * * * two per centum per annum on the average daily balances of all moneys so deposited by such county treasurer in said bank while acting as such depositary.'

"A consideration of the three sections of the statute mentioned, from which excerpts are quoted, discloses that in none of them is there any provision limiting or prohibiting the county treasurer from contracting for a greater rate than 2 per cent. in the event of insolvency. Section 5564, in the excerpt quoted, says that there shall be 2 per cent. paid on the average daily balances while the bank is acting as such depositary. After the bank became insolvent, it could not be said to be

a depositary paying 2 per cent. on daily balances. When the insolvency occurred, the bank's liability became fixed and settled in the amount of the deposit at that time, which in this case was $4,000.

"Turning now to the question of whether the bank had a right to make the contract, Rem. Rev. Stat. Section 3261, which is one of the sections of the state banking law, provides that no bank shall pledge any of its securities to any depositary, 'except that it may qualify as depositary for * * * public funds deposited by any public officer by virtue of his office and may give such security for such deposits as are required by law or by the officer making the same.'

"In this case, as above seen, the security required by law is either a bond or in lieu thereof certain designated bonds, notes, or other obligations as specified in section 5563. Section 3261 goes farther than covering the pledging of securities for deposits as required by law and authorizes the pledging thereof of such securities as 'the officer making the same' may require. In this case, the officer required the deposit of the securities which were taken in lieu of a surety bond, and also a contract to pay 6 per cent. interest after insolvency. Had the treasurer taken a surety bond to protect her deposits under the contract mentioned, there can be no doubt that the surety company would be bound by the contract and required to pay 6 per cent. interest after insolvency, because its liability would become fixed and enforceable at that time. Lucas v. American Bonding Co., 174 Wash. 433, 24 P. (2d) 1084.

"The Legislature, in authorizing the county treasurer to take designated bonds, etc., in lieu of

a surety bond, certainly did not intend that public funds should have less protection when the substituted securities should be taken rather than a surety bond. The statute says the bonds, etc., may be taken in lieu of a surety bond. Neither the county nor the bank having exceeded its authority in making the contract to pay 6 per cent. after insolvency, it follows that the contract was valid and enforceable. By virtue of the contract and the pledging of securities, the county treasurer became a creditor of the insolvent bank, protected by its contract, and therefore entitled to be paid in full, even though the bank liquidation did not produce sufficient assets to pay the other depositors.

"In Spring Coal Co. v. Keech (C.C.A.), 239 F. 48, 53, L.R.A. 1917D, 1152, after reviewing the authorities, it was said: 'We think a careful reading of all the authorities will show that where estates are insolvent and all the claims are of like dignity, the court declares the dividend upon the basis of the amount of principal due at the time the property passed into the hands of the court, because it is immaterial whether the dividend is calculated upon the interest and principal combined, or the principal alone; but where there are claims of different classes, and one is secured by a mortgage of real estate, the holder of such mortgage is entitled, not only to the principal, but to the interest that accrues up to the time of satisfaction, even though nonlien creditors may not receive any dividend at all. This must be so if the court enforces contracts as parties made them.'

"In American Iron, etc., Co. v. Seaboard Air Line Railway, 233 U. S. 261, 34 S. Ct. 502, 505, 58

L. Ed. 949, it is said: 'Principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, even though what remains is not sufficient to pay claims of a lower rank in full. (Citing authorities.)'

"In the case now before us, the county treasurer, having taken the pledge of securities and the contract, became a creditor of a higher class than the other depositors.

"The judgment will be affirmed."

In order to avoid the force of the foregoing cases, counsel cite several authorities which I shall now proceed to discuss.

The case of *U. S. v. Knox,* 111 U. S. 784, 28 L. Ed. 603, was not a case where the question of the right of a secured creditor to receive interest after insolvency was involved. It was a case of a general creditor seeking to attach interest after insolvency. We readily concede that a general creditor is not entitled to interest after insolvency.

In any event, the case of *U. S. v. Knox* was discussed in the case of *Ticonic National Bank v. Sprague,* supra, wherein the Court says:

"The rule of *White v. Knox* (U. S. v. Knox is the same case) does not require that interest be denied to the secured creditors unless the principle of equality of distribution is to be applied as between all."

The above means, of course, that if there were a number of secured creditors, all of equal rank, then one

of them would not be entitled to interest as against the other.

The case of *Greva v. Rainey, Wood, et al.*, 33 Pac. (2d) 697, was a case where the rights of general creditors, depositors and stockholders were involved, and makes no reference to secured creditors.

The case of *Ledford v. Skinner,* 69 Pac. (2d) 519, was a case wherein the rights of depositors were involved, all of equal rank.

In the case of *In re Farsch,* 31 Pac. 755, the Court says:

> "We think that the plain and universally recognized principle of equity demands that a secured creditor must first exhaust his security, apply the proceeds to the diminution of his claim, and then share pro rata with the other unsecured creditors on balance of claim."

That is the only question that was involved in the case, and the question of interest to secured creditors after insolvency was not involved or raised.

To the same effect is the case of *First National Bank of Seattle, v. Mansfield,* 221 Pac. 595.

In the case of *Beaver Co. v. Home Indemnity Co.,* 52 Pac. (2d) 435, it was said that the question as to interest was in a sense declared to be moot because the assets were insufficient to pay the principal. (Quotation on page 458, column 2.)

In the case of *First Wisconsin National Bank of Milwaukee v. Kingston,* 94 A. L. R. 465, cited in appellant's brief, it was held:

"A secured creditor of an insolvent bank is entitled to dividends upon the full amount of his claim until the same is fully paid rather than upon the balance remaining after crediting thereon the amount realized by the enforcement of the security."

The question of interest after insolvency was not involved.

In the case of *Broadway-Main Street Bridge Dist. v. Taylor,* 57 S. W. (2d) 1041, a statute of the State of Arkansas was construed, and has no application here, as we have no such statute, and in that case, there was no reference to interest after insolvency.

The case of *Louisville v. Fidelity & Columbia Transfer Co.,* 54 S. W. (2d) 40, is not applicable, as the question of interest after insolvency was not involved. The decision went to authority of a bank to pledge its assets.

In the case of *In re Victor,* 166 N. Y. S. 1012, the decision went to the question as to the right of a secured creditor to dividends. No question of interest after insolvency was involved.

In the case of *State v. State Bank of Alamagordo,* 32 Pac. (2d) 1017, it was held that on insolvency of a state bank, secured creditor was entitled to prove claim and receive dividends on full amount of claim regardless of any sums realized on securities after adjudication of insolvency, but not for more than full amount. No question of interest after insolvency was involved.

In the case of *U. S. Fidelity & Guaranty Co. v. Malia, Bank Commissioner,* 49 Pac. (2d) 954, all that was held was that a secured creditor of an insolvent bank must first exhaust his security and apply proceeds of value thereof upon his claim, and can participate in funds for distribution only upon basis of balance thus remaining after giving such credit. No question of interest after insolvency was involved.

Referring to the above case, counsel states as follows:

> "The Court in this case construed the Utah bank act and came to the conclusion that a secured creditor must surrender or account for the value of his collaterals at the time of insolvency, apply the avails on the claim as fixed on the closing *without added interest.*"

I cannot find the words *"without added interest"* in the decision. This must be an inadvertence on the part of counsel, or an outgrowth of their imagination.

In the case of *Merrill v. National Bank of Jacksonville,* 173 U. S. 131, 43 L. Ed. 640, the only question decided was that a secured creditor of an insolvent national bank may prove and receive dividends upon his claim as it stood at the time of the declaration of insolvency without crediting either his collaterals or collections made therefrom after such declaration, subject always to the provisions that dividends must cease when from them and from collaterals realized the claim has been paid in full. No question of interest after insolvency was involved.

Whatever the decision in that case may have been, the case is referred to and disregarded in the case of *Ticonic National Bank v. Sprague,* supra.

The remaining authorities cited by counsel in their brief do not affect the question involved in this suit, i. e.: Is a secured creditor entitled to interest after insolvency?

It may be conceded that there has been a diversity of opinion as to whether or not interest could be allowed to a secured creditor after insolvency, but the question now seems to be put at rest entirely by the case of *Ticonic National Bank v. Sprague,* supra, and it may not be amiss to state that the Comptroller of the Currency of the United States, since the decision in that case, has universally followed that rule.

There being no authority from the Supreme Court of the State of Nevada on this question, I think we may assume that this Court will hold that the Judge of the District Court was justified in following the decisions of the Federal Courts, unless some strong showing to the contrary can be made.

The case nearest to a decision by the Supreme Court of the State of Nevada is the case of *Organ v. Winnemucca State Bank & Trust Co.,* 26 Pac. (2d) 237. In that case, as a matter of fact, the judgment allowed a secured creditor his full claim with interest, but, to be perfectly candid with the Court, the question of interest was not raised. The question involved was the authority of a bank to borrow money in excess of the par value of all its capital stock.

Counsel for appellant seem to attach great importance to the statute of the State of Nevada, as follows:

> "* * * No bank, corporation, firm or individual, knowing of such taking possession by the examiner shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter *incurred* against any of the assets of the bank, etc."

Counsel confuse the word "incur" with the word "accrue". According to Webster, "incur" means: "to become liable to by one's own action; contract, as a deed."

According to 22 Cyc., page 73, "incur" is defined as a word used and employed "to become liable for, subject to, to bring on, to occasion or to cause".

According to Words & Phrases, "incur" means to become liable for.

The pertinent question, therefore, would be: When did the Lyon County Bank become liable for interest?

This indebtedness, as to both principal and interest, was incurred on the 1st day of July, 1931. Counsel's argument would lead to the following conclusion:

If a man borrowed $10,000 on a note payable $1000 annually, and the maker of the note became insolvent at any time before full payment, the payee of the note could not collect for the installments accruing after insolvency, as the maker would contend that the remainder of the note was incurred thereafter. The reasonable construction would be that the indebted-

ness was incurred at the time of the signing of the note and would apply to any new indebtedness, but not to indebtedness accruing thereafter.

If the Nevada law had said that no lien or liability thereafter ACCRUING could be collected, then counsel's contention might be correct, but there is a vast difference between "incurring" and "accruing" or "incurred" and "accrued". If the lawmakers had meant that no indebtedness or liability thereafter ACCRUING could be paid, it would have been very easy to say so, but they did not say "accrued". They seem *ex industria* to have said "incurred". What the statute means is that no new debt could be created thereafter because in such case an equal distribution to creditors could not be made. They meant a man could not obligate himself by a new instrument, or do any new act creating or incurring an indebtedness after the date of insolvency.

When the Lyon County Bank signed the note, it agreed to pay the interest just as much as it did the principal, and the liability for both principal and interest was incurred at that time. The interest accrued afterwards.

It must be borne in mind that the claim of the appellee is on a contract. It is not a case where interest is allowed as a penalty or for damages, but it is a contractual relation. There is no difference in the principal and interest as to the time when they were incurred. The promises to pay principal and interest were simultaneously made and both were in-

curred at the time the note was signed, and the obligation was incurred at the time of the signing of the original note.

Counsel have cited no authority in support of the interpretation of Section 702, Nevada Compiled Laws of 1929. I have been unable to find much authority on this subject. My idea would be that no one has ever heretofore placed the construction on the statute that counsel try to place on it. There is one case, however, that seems to have some bearing. I refer to the case of

Knight v. Whitman, 99 Am. Dec. 652,

as follows:

> "Under Act Feb. 10, 1866, providing that, in addition to personal property exempt from execution, on liabilities incurred after June 1, 1866, there shall be exempt certain other additional property, where an action had been brought prior to the date fixed by such statute, and judgment was rendered for defendant, which was reversed on appeal and rendered for plaintiff, the judgment determined that the liability existed at the time suit was brought, and hence the liability of defendant was incurred prior to the 1st day of June, 1866."

> "In Agawam Bank v. Strever, 18 N. Y. 502, the note sued on was left with the bank as collateral security for all liabilities incurred; and the court, in speaking of this writing, said: 'It is true that upon a strict, grammatical construction of these terms, they would be held to embrace

only liabilities which had been already incurred. The word "incurred", being in the past tense, when used without other words to modify its meaning, would in strictness relate exclusively to past transactions.' It was held, however, that it was proper to resort to evidence of attending circumstances to assist in ascertaining the meaning and intention of the parties."

Beemer v. Packard, 28 N. Y. Supp. 1045, 1046.

Counsel also contend that the pledge agreement, wherein it is stated:

> "As collateral security for the payment of all our present indebtedness to The Reno National Bank of Reno and all of the future indebtedness to said bank which we may incur hereafter from any cause or upon any consideration, we have assigned and do hereby assign, deliver and deposit with said Reno National Bank, the following described property * * *"

does not secure the interest accruing thereafter.

What is said above applies to this contention. Here the whole question hinges upon the interpretation of the word "incur". The indebtedness was incurred at the time of the making of the agreement. It makes no reference to indebtedness accruing. The obligation to pay the interest was just as binding and was just as much a debt or liability as the obligation to pay the principal. The obligation to pay the principal and interest was incurred at that time, but the interest accrued thereon, and the word "accruing" is entirely left out of the agreement.

Counsel takes up much space in their brief arguing questions of fact, i. e., as to interest arising out of the collection of interest on the pledged securities, and the application thereof, and upon the further question of the application of payments.

The Lyon County Bank was declared insolvent on the 16th of February, 1932. The note on pages 15 and 16 of the transcript of record shows that only one payment was made before insolvency, viz., $2420 on December 16, 1931, which paid the interest to December 31, 1931. All the other payments were made after insolvency. Therefore, such payments must have accrued on the collateral security and it would make no difference whether they were applied as principal or interest under the rule in the case of *Ticonic National Bank v. Sprague,* supra.

If appellee is entitled to payment of interest accruing after insolvency of the Lyon County Bank, then there would be no point in arguing as to what amounts of interest arose from the collection of interest on the securities or the application of payments.

SUMMARY.

The case of *Ticonic National Bank v. Sprague,* supra, clearly and concisely lays down the rule adopted by the Federal Courts. Right at the beginning of the decision, we find the following:

> "The question for decision is whether or not a secured creditor of a national bank, holding a non-interest bearing claim, is entitled to interest

for any period subsequent to the insolvency of the bank, when the assets on which he has a lien are sufficient to pay the principal and interest but the total assets of the bank are not sufficient to pay in full all creditors' claims as of the date of insolvency."

That clear and concise statement of the question nvolved is answered as follows:

"As the obligation to pay interest is not destroyed by the insolvency and as the rights of the secured creditor in his collateral, contractual or statutory, are likewise unaffected, we are of the opinion that a secured creditor of a national bank in receivership may enforce his lien against his security, whêre it is sufficient to cover both principal and interest, until his claim for both is satisfied."

If the above is true, as applying to a creditor of national bank, there is no reason why it should ot apply to a creditor of any bank, even though the reditor in this case happens to be a national bank.

That leaves the sole remaining question of the aplication of the statute of the State of Nevada. That tatute provides that no bank, corporation, firm or inividual knowing of such taking possession by the xaminer, shall have a lien or charge for any payment, dvance or clearance thereafter made or liabiilty hereafter *incurred.*

How the words *"thereafter incurred"* can be contrued as meaning *"thereafter accrued"* is entirely eyond my comprehension.

I feel that I have shown to the satisfaction of this Court that the Judge of the District Court followed the correct rule as laid down by the latest decision of the Supreme Court of the United States, and that he correctly interpreted the Nevada statute.

Under the authorities I have cited, I submit that the judgment of the lower Court should be affirmed.

Dated, Reno, Nevada,
February 17, 1939.

Respectfully submitted,
N. J. Barry,
Attorney for Appellee.